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THE LEGAL PROFESSION IN COLONIAL AMERICA*

Anton-Hermann Chroust†

VI. NEW YORK

New York accepted the common law of England as the basis of its own law at a relatively early stage. This favorable attitude towards English law is to a large extent probably due to the fact that the colony was acquired by conquest rather than settlement. Soon after the English had taken over New Amsterdam from the Dutch in 1664 and had renamed it New York, a code of laws was promulgated under the title of the *Duke's Laws*. In 1673 the Dutch retook New York and re-introduced the old Dutch laws, but lost it again in 1674 to the British who restored the code of 1665. This code, which is mainly the work of Matthias Nicolls, a barrister from Lincoln's Inn (1649), drew alike from the common law, the Dutch colonial laws and from some of the local laws in force in the New England colonies. But being the work of a trained English barrister and, it is believed, the result of many suggestions made by Clarendon, the Lord High Chancellor, it basically adhered to the English common law. This becomes quite evident from a statement made by Judge Daniel Horsmanden one hundred years later (in 1765):

The Supreme Court here proceeds in the main according to the practice of the courts at Westminster; and the Common Law

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of England, with the statutes affirming and altering it before a legislature was established, and those passed since such establishment expressly extended to us without legislative acts . . . constitute the law of this Colony.¹

The *Duke's Laws* of 1665 also established a rather elaborate system of courts and provided for a detailed organization and administration of the judicature. The early court system consisted of the local justices of the peace sitting in Courts of Sessions, and the Court of Assizes, which comprised the Governor, the Council, and the Courts of Sessions justices. The Court of Assizes had both legislative and judicial powers. In 1683 the legislature set up Courts of Sessions for each county, a Court of Oyer and Terminer (as well as some other minor courts) and a supreme court consisting of the Governor and the Council. Finally, in 1691 New York established a real and regular system of courts to administer justice, which was wholly divorced from the legislature and the Governor and Council: it created a Supreme Court of Judicature with a Chief Justice and four associate judges, all appointed by the Royal Governor at "the pleasure of the Crown."

The majority of the early chief justices and nearly all of the associate judges were laymen. In this New York did not differ from the other American colonies. On the other hand, there were some experienced and trained lawyers who, at a relatively early period, held the highest judicial office in New York. William Smith (Chief Justice from 1692 to 1700 and again in 1702) was considered the leading lawyer in the colony; and William Atwood (Chief Justice in 1701), John Bridges (Chief Justice in 1703) and Roger Mompesson (Chief Justice in 1704) were distinguished English lawyers. Lewis Morris, Chief Justice from 1715 to 1733, was acclaimed as a man unrivalled "in the knowledge of the law." His successor, James Delancey, had been admitted to the bar of the Inner Temple. Benjamin Pratt, a very distinguished Massachusetts lawyer, was chief justice from 1761 to 1763. He was succeeded in office by Daniel Horsmanden (1763-1778), a lawyer of few accomplishments and not too much ability, who had studied at the Middle Temple (1721) and the Inner Temple (1724).

Despite these rather favorable conditions, New York, too, failed to develop a class of competent professional lawyers or practitioners at an early date; and this for two main reasons:

¹ *Forsey v. Cunningham* (1765), reported in *New York Historical Society Collection*.

first, the constant and at times serious interference of the Royal Governor with the judiciary and, hence, at least indirectly, with the legal profession; and secondly, the strong aversion of the ruling class of New York merchants and large land-holders to the lawyer, especially to an organized class of professionally trained lawyers. It should be noted, however, that this aversion, as deep-seated as it might have been in the beginning, was not as bitter and long-lasting as in other colonies. The clash between the Royal Governor and the legal profession, especially the bench, however, was another matter. For nearly one hundred years the Governor and the General Assembly were involved in a bitter struggle over the right to appoint judges. The Governor on his part insisted that he, and he alone, had the right to appoint judges "during his Majesty's pleasure," while the General Assembly maintained that it had this right "during good behavior" of the judge. In consequence of this deadlock, the General Assembly refused to vote judicial salaries until the Governor should yield. As late as 1762 Lieutenant-Governor Colden complained about the insufficient salaries paid to the judges and the disastrous effects this had upon the New York bench.² And Chief Justice Benjamin Pratt, in the same year, reported: "[I]f the judgments of the Supreme Executive Courts are only vague and desultory decisions of ignorant judges . . . this cannot be guarded against without some such establishment for the King's judges as to render the office worth a lawyer's acceptance."³ Pratt himself, we are told, had to live "at the expense of his private fortune" while serving as chief justice of New York. But this was not the only difficulty; one Royal Governor, in order "to discourage Boston principles," that is, in order to intimidate a trained lawyer who stood on the principles of the law, found it expedient to remove from office a chief justice because he had failed to decide in favor of the Governor. A contemporary observer remarked that "a Governor and such of his council as he thinks proper to consult with, dispense with such . . . laws as are troublesome or stand in their way . . ."⁴ As a result of such incidents the judges and the law officers of the Crown were held in general contempt, and the judicial positions as well as the law offices of the Crown frequently had

² 7 COLONIAL DOCUMENTS OF NEW YORK, Letter of Jan. 11, 1762. See *ibid.* Letter of Jan. 25, 1762.

³ *Ibid.* Letter of May 24, 1762.

⁴ DOUGLASS, SUMMARY OF THE PRESENT STATE OF THE BRITISH SETTLEMENTS IN NORTH AMERICA (1747).

to be filled with decidedly inferior men: "The Attorney-General's office for upwards thirty years past," Colden reports to England, "has been filled with men of no esteem as to their skill in the law . . . [and] for some time past we find no man entrusting his private affairs to the person with whom the King's rights in the Province are entrusted."⁵

The first lawyers in Dutch New Amsterdam were probably Lubbertus van Dincklagen, a man reputed to be a person of superior education, a Doctor of Laws, and an able and accomplished jurist; Adriaen van der Donck, a Doctor of Civil and Canon Law from the University of Leyden, who had been admitted to practice before the High Court of Holland; David Prevoost, according to tradition an attorney and counsellor, who was also a notary of New Amsterdam in 1652 and possibly before that time; Matthias de Vos, also a notary; and Dirck van Schelluyne. It is doubtful, however, whether Adriaen van der Donck ever practiced law in New Amsterdam, although he seems to have done so in Rensselaerswyck as early as 1649. Dirck van Schelluyne, who came to America in 1641 (according to some in 1653), had previously practiced in The Hague. It appears that he was an experienced and skillful lawyer who also held the position of High Bailiff of New Amsterdam. In the opinion of some people he was the first true lawyer in the city. His independent spirit, however, brought him into serious conflict with Stuyvesant. As a result he found it impossible to establish a legal practice. He is said to have lingered on for awhile, tending a store and acting as a notary. Finally he tired of this frustrating life and returned to Holland. The general conditions which drove away Schelluyne apparently did not change under British rule. Already the *Duke's Laws* of 1665, which also are called "Nicolls' Code" on the assumption that Mathias (or Matthias) Nicolls was their true author, provided for the punishment of "common barrators" by fine or imprisonment if found to be "vexing others with unjust, frequent and endless lawsuits." And by "barrators" the law probably had in mind any legal practitioner or "barrister." In 1677 the following question was laid before the Council of New York: "Whether attorneys are thought to be useful to plead in courts or not? Answer. It is thought not." Thereupon it was "resolved and ordered [t]hat pleading attorneys bee no longer allowed to practise in ye Government, but for ye depending causes."⁶

⁵ 7 COLONIAL DOCUMENTS OF NEW YORK, Letter of Jan. 25, 1762.

⁶ MINUTES OF THE COUNCIL OF THE STADT HUYS, May 16, 1677.

Subsequently, this order was modified, and in the same year the Court made the following rule: "No one be admitted to plead for any other person or as attorney in the court without hee first have his admittance of the court or have a warrant of attorney for his so doing from his client." Thus it seems that the attorney, prior to his admission to practice before a particular court, had to have either the consent of the court or produce a "power of attorney" made out by his client.

The early records of the courts of assizes in New York indicate the activities of certain men who appear in so many cases that they must have been regarded as regular "practitioners." In the records of the court in New Castle, for instance, the following entry can be found under the date of November 7, 1676: "Upon petition of Thomas Spry desiering that he might be admitted to plead some peoples cases in court . . . the whorpp court have granted him a license so long as the petitioner behaves himself well and carries himself answerable thereto."⁷ Evidently something of a distressing nature must have happened around the year 1677 to annoy the Governor of the Province with the way these practitioners deported themselves, for on May 29, 1677, the Governor and Council "resolved and declared that pleading attorneys be no longer allowed to practice in the government but for ye depending causes."⁸ This order was read in open court at Upland and New Castle.⁹ The order, however, must soon have been relaxed, for on June 16, 1677, John Matthews was admitted to practice as an attorney in New Castle, upon taking an oath "not to exact unallowed fees, nor to take fees from both plaintiff and defendant and that he will not take any apparent unjust case in hand, but behave as all attorneys ought to do."¹⁰ Subsequently it was ordered that the crier of the court receive "for every attorney . . . admitted and sworn in court, 12 guilders or half a beaver."¹¹ Thus it appears that as early as 1677 in New York, or at least, in some of the New York courts, a definite license fee was to be paid by people who intended to practice as attorneys.

Somewhat later the power of admitting attorneys to practice became "centralized" in the person of the Royal Governor who

⁷ NEW CASTLE RECORDS 9. New Castle, now in Delaware, was at that time under the proprietorship of the Duke of York and, hence, "part" of New York.

⁸ HAZARD, *ANNALS OF PENNSYLVANIA* 438 (1850).

⁹ *Ibid.*

¹⁰ NEW CASTLE RECORDS 83.

¹¹ *Ibid.* Cf. 1 CHESTER, *COURTS AND LAWYERS OF NEW YORK* 323, 357 (1925).

claimed for himself the sole right of licensing attorneys. The first license of this kind was, as far as we know, issued in 1709. Naturally, in view of the strained relations between the Governor and the budding legal profession of New York, this policy lent itself to much abuse, especially since the Governor, as a contemporary observer deplores, at times would license all applicants irrespective of their professional qualifications, or at times would heed the recommendations of the chief justice or the other judges who probably suggested the names of qualified men. Experience has taught, however, that where a person was admitted by any court to practice in all courts or where, as in New York, he was admitted by a central authority such as the Governor or the Council to practice in the whole Province, there did not develop any great sense of professional solidarity or distinct consciousness of a membership in a particular bar, unless awakened by some extraneous circumstance. New York, as a matter of fact, did not have a bar animated by a strong spirit of professional unity until the eve of the American Revolution. And, as shall be shown later, whenever the New York bar joined forces, it did so only to form a common front against the overbearance of the Governor.

The suppression or repression of the legal profession as a class in New York caused the work which ought to have been done by trained and responsible experts to fall into the hands of incompetent and irresponsible charlatans. In any event, prior to the year 1680, it does not appear that there existed in New York, a class of regular legal practitioners. The records of that period, however, frequently refer to attorneys who appeared for the parties. But it must be assumed that these attorneys all were non-professional men, persons who had no legal training and probably few or no principles, although in all likelihood they were men adroit at speaking and writing. This situation apparently led to so much abuse that in 1683 an act was passed forbidding sheriffs, clerks, and justices of the peace to act as attorneys in their own courts; and as late as 1762 there was much complaint about the "inferior men" who were to be found either on the bench or at the bar.

Apparently around 1680 a few English lawyers began regularly to practice law in New York, among them John Palmer; James Graham, the Attorney General (who may have been a layman); Thomas Rudyard; Mathias Nicolls, a barrister of Lincoln's Inn; John Rider; John Sharpe; Thomas Owen; Nicholas Bayard; a Mr. Leveridge and a Mr. Bogardus. But it is not certain whether all of these men had been bred to the law, or

made its practice an exclusive employment. By 1695 the number of competent lawyers in New York was still so small that it was possible for one party to retain the whole New York bar to the detriment of the opposing party. Hence in that year a statute was enacted: "Whereas the number of attorneys at law that practice at the Barr in this Province are but few and . . . many persons retain most of them on one side to the great prejudice and discouragement of others that have or may have suits at law," it is provided that no person may retain more than two lawyers in any one law suit.¹² This provision was to remain in force for two years. But fifty years later the situation had not improved substantially. In a report by Chief Justice Horsmanden of 1743 or 1744, we are told that the whole bar of New York consisted of a mere eight lawyers, namely, the Attorney General Bradley; Joseph Murray (Middle Temple 1725); William Smith (Yale 1719); James Alexander; John Chambers; William Nicolls; David Jamison and Abraham Lodge.¹³ It might be interesting to note here that the youthful Chief Justice James Delancey disbarred both William Smith and James Alexander, who were attorneys in the Zenger case, for their attacks upon the validity of the appointment of the chief justice and an associate judge, Philipse, to the bench. Both were reinstated, however, two years later.

It seems that, measured by the importance and wealth of the colony, the New York bar continued to remain unusually small. Between 1709 and 1776 only one hundred and thirty-six attorneys were licensed by the Governor, while a mere forty-one lawyers practiced in the City of New York between 1695 and 1769, many of them undoubtedly sharpers and pettifoggers. Among the relatively few lawyers, however, there was, as Chancellor Kent puts it, "a constellation of learned and accomplished men" such as William Livingston (Yale 1741), who studied under James Alexander; William Smith, Jr. (Yale 1745), who studied under his famous father; Whitehead Hicks, who together with William Livingston and William Smith, Jr., studied in the law office of William Smith, Sr.; Peter Van Schaak (King's College 1766), the friend of John Jay and Egbert Benson;

¹² An Act Regulating the Retaining Attorneys at Law, Oct. 22, 1695, 1 COLONIAL LAWS OF NEW YORK 351. Cf. BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 78 (1909).

¹³ HORSMANDEN, *A JOURNAL OF THE PROCEEDINGS IN THE DETECTION OF THE CONSPIRACY FORMED BY SOME WHITE PEOPLE, IN CONNECTION WITH NEGRO AND OTHER SLAVES, passim* (1744). This pamphlet relates to the episode known as the Negro Plot of 1741.

George Clinton, who became Vice-President of the United States in 1805; James Duane, who in 1789 became United States district judge; Robert Yates; and John Jay (King's College 1764), who studied law in the office of Benjamin Kissam, a famous lawyer, and who ultimately became the first Chief Justice of the Supreme Court of the United States. Although inordinately small for such an important colony, the influence of these "learned and accomplished men" upon the development of the legal and political institutions of New York just prior to the Revolution was unusually great, especially whenever they decided upon some concerted action.

John Jay, if not the most outstanding, at least the best known lawyer in colonial New York, was a brilliant and capable man of spotless integrity who, with the exception of the Presidency of the United States, attained the most important public offices his country could bestow. Lindley Murray, himself a lawyer, said about Jay that, "he was remarkable for strong reasoning powers, comprehensive views, indefatigable application, and uncommon firmness of mind."¹⁴ After his admission to the bar in 1768, he soon developed a successful practice and for a time became associated with Robert R. Livingston. In the controversy which ultimately led to the Revolution and the independence of the United States, Jay was very active in resisting British coercion. Although in the beginning somewhat reluctant to accept a policy of separation from England, he soon became one of the most ardent supporters of the cause of American independence. But he also found it impossible to reconcile the American demand for freedom with the continued existence of human slavery. As long as that institution was tolerated, he observed in 1780, the American "prayers to Heaven for liberty will be impious . . . [T]hose who ask for equality ought to do it."¹⁵

Jay was a member of the First and Second Continental Congress, and he was responsible for the resolution which authorized the New York delegation to sign the Declaration of Independence. In 1777 he was made chairman of the committee which drafted the New York Constitution, and shortly thereafter he became chief justice of his native state. In 1778 he returned to the Continental Congress and became its president. In 1782 he was commissioned together with Benjamin Franklin, John Adams, Thomas Jefferson, and Henry Laurens to negotiate a

¹⁴ PELLEW, JOHN JAY 15 (1898).

¹⁵ Letter from John Jay to Benson, Sept. 17, 1780, 1 JOHNSON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 406 (1890).

peace treaty with Great Britain; and in 1784, upon his return to America, he was once more elected a delegate to the Continental Congress. The following year he was made Secretary of Foreign Affairs; and in 1789 George Washington appointed him the first Chief Justice of the Supreme Court of the United States. He held this position from 1789 to 1795 during which time he wrote the decision in *Chisholm v. Georgia* (1793). In 1795 he became Governor of New York and served in that capacity until 1801, when he retired from public life.

One of the most impressive acts in Jay's brilliant career was the negotiation of a treaty between the United States and Great Britain in 1794, known as the Jay Treaty. This treaty, which has all the earmarks of a lawyer's way of thinking and reasoning, above all stresses the principle of mixed arbitration. The device of mixed arbitration, with which he first became acquainted in 1773 when he was a member of a royal commission for settling the boundaries between New York and New Jersey, apparently appealed to Jay's philosophic and legal bent of mind. The idea of mixed arbitration subsequently became an important as well as successful feature in American foreign policy. Under the pseudonym of "Publius," Jay wrote nos. 2,3,4,5, and 64 of *The Federalist*; and, in the further defense of the Federal Constitution, he published anonymously *An Address to the People of New York*.

A distinct bar association, called the New York Bar Association, seems to have been formed in New York as early as 1744 (some authorities claim 1745 or 1747, while one authority suggests the year 1741) and, thus, became the earliest known bar association in colonial America. This association, which apparently invited the support of every member of the bar in order to develop a collective opinion and some concerted action, carried on its activities until 1770. Since its records no longer exist, little is known about its specific organization. The reason for its formation, however, was "political" rather than professional in the strict sense of the term. In 1744, the probable year of its founding, the association took concerted action in the long and bitter controversy between the legislature and the Governor over the independence and integrity of the judiciary — over whether the tenure of judges should be made dependent upon "the pleasure of the King" and his Governor, or whether it should rest solely upon "good behavior." Apparently it was this particular political issue which chiefly, if not exclusively, occasioned the formation of the New York Bar Association.

During the 1760's the association achieved its greatest power and influence. As a matter of fact, it became so powerful that Colden, the Lieutenant-Governor, felt himself compelled to report to the English government that the greatest danger to the Crown and to the Colony itself came from what he called the "domination of the lawyers." These lawyers, in the opinion of Colden who agreed completely with the government, were "as insolent and petulant and at the same time as well skilled in the chicaneries of the Law as perhaps are to be found anywhere else."¹⁶ What had prompted Colden's bitter outbursts against the New York bar was the following incident: between 1763 and 1765 the united bar of New York fought a successful battle against every attempt of Colden to compel the courts to allow an appeal to the Governor and Council on the facts as well as on questions of law. In 1764 Colden, ever resentful of the lawyers, again reminded the English government that the influence of the bar and especially the possible co-operation of bench and bar, were "dangerous to his Majesty's prerogative and authority and his Rights . . . in this Province, in case no appeals as to the merits of the cause be allowed to the King and his Privy Council."¹⁷

Apparently Colden was so incensed over the continued political success of the united New York bar that he felt it necessary to keep up his attacks and denunciations of the association. He wrote in 1765:

If the profession of the law keep united as they are now, the abilities of an upright judge will not be sufficient to restrain the lawyers, without the security of an appeal to a court [the Governor and Council] where they can have no undue influence. The lawyers influence every branch of our Government, a domination . . . destructive to Justice . . .¹⁸

And finally, in a letter addressed to the Earl of Halifax in 1765, Colden displays his thorough dislike of the legal profession, especially of an organized, competent, and determined profession:

The dangerous influence which the Profession of the law has obtained in this Province more than in any other part of his Majesty's Dominions is a principal cause of disputing appeals to the King, but as that influence likewise extends to every part of the administration, I humbly conceive that it is become a matter of State [T]he Profession of the Law [has]

¹⁶ Letter from Colden, Sept. 14, 1763, in WARREN, A HISTORY OF THE AMERICAN BAR 98 (1913).

¹⁷ *Id.* at 99. Letter of Nov. 7, 1764.

¹⁸ *Id.* Letter of Jan. 22, 1765.

entered into an Association the effects of which I believe your Lordship had formerly opportunity of observing some striking instances. They proposed nothing less to themselves than to obtain the direction of all the measures of Government . . . All Associations are dangerous to good government . . . and associations of lawyers the most dangerous of any, next to the military. Were the people freed from the dread of this Domination of the Lawyers, I flatter myself with giving general joy to the people of the Province.¹⁹

His strictures aside, Colden inadvertently pays here the highest compliment that could be paid to the legal profession anywhere. Perhaps he anticipated the determined and successful resistance to the Stamp Act in 1765, resistance which to a large extent was instigated and supported by the concerted and organized efforts of the New York Bar Association. Perhaps he even anticipated the role which the profession was to play in the approaching American Revolution.

The New York Bar Association also concerned itself with issues touching upon the internal problems of the profession itself. It agreed, for instance, that lawyers might not accept as clerks persons intending to become lawyers themselves. Also, it dealt with standards of admission to practice, legal etiquette, and professional ethics. It limited the number of students that might be trained in any one law office, and it determined the wages to be paid to clerks.

Presumably as a result of internal strife the New York Bar Association disbanded about 1770. Perhaps the struggle between the powerful Delancey and Livingston families for control of the colonial legislature dealt the death blow to the Association. Since most of the lawyers in the New York Assembly were supporters of the Livingston faction, the Delancey forces conducted their 1768 campaign on a platform calling for a purge of the Colony's "pettifogging Attorneys" who constituted "the bane of Society."²⁰ The election resulted in a victory for the Delancey family. It seems also that when the struggles with the government over the tenure of judges and later over the Stamp Act had come to an end, what originally had been the main reason for the existence of the bar association had disappeared. In any event, it ceased to act as a uniform and united body. But in New York, as elsewhere, individual lawyers, by asserting and re-asserting the rights of the colonists against the Crown, remained the leaders in the coming struggle for independence.

¹⁹ *Id.* Letter of Feb. 22, 1765.

²⁰ Blaustein, *New York Bar Associations Prior to 1870*, 125 N.Y.L.J. 1186, 1188 (1951).

Although the New York Bar Association went out of existence around the year 1770, the interest in some form of collective professional activity was still very much alive among some lawyers. In that same year a club, called "The Moot," was founded in order "to encourage a more profound and ample study of the civil law, historical and political jurisprudence, and the law of nature."²¹ The most active and prominent members of this club were William Livingston and Samuel Jones, and somewhat later, John Jay, Egbert Benson, Richard Morris Smith, Robert Livingston, Stephan Delancey, and Lindley Murray, while other members of the New York bar on occasions attended its meetings. The Moot, which disbanded early in 1775, apparently also discussed important questions and issues of law, and in one instance the Superior Court of New York requested the expert advice of The Moot in some involved legal issue.

VII. NEW JERSEY

New Jersey, especially after its consolidation as a Royal Province in 1702, probably has followed more closely the common law of England and English precedents than any other American colony. This may be due to the fact that, among other things, it became a province at a relatively late date, that is, at a time when most of the older colonies, by their own unpleasant experiences, had learned that the administration of justice without a stable and detailed body of laws is at best a constant source of difficulties and uncertainties.

The earliest records of New Jersey indicate that, at least in Monmouth County, courts were held in 1667. In 1675 the Legislature established small local courts and the Court of Assize which functioned as a court of appeals. The judicature was improved upon by the statute of 1682 which introduced a more regular system of courts in East New Jersey, namely, monthly small local courts, yearly session of county courts, and a Court of Common Right with law and equity jurisdiction. In West New Jersey the statute of 1681 created small local courts, and the statute of 1693 provided for a Court of Appeal which consisted of the county judges or justices of the peace and the Governor's Council. This court, in 1699, became the Provincial Court or Court of Appeals. All the judges in the lower courts were laymen elected by the people.

21. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 171 (1953).

In 1702 New Jersey became consolidated into one single Royal Province under one Governor; and in 1704 the governor introduced an orderly and uniform system of courts in order to administer justice according to law. This system consisted of the justices of the peace, a Court of Common Pleas, a Court of General Sessions and a Supreme Court of Judicature. It also provided for a final appeal to the Governor and Council. Of the first nine chief justices no less than four were trained lawyers, a remarkable record for any American colony. But prior to the Revolution, only a few of the other judges had adequate legal training.

In keeping with its rather close adherence to the common law of England and to English practices, New Jersey, at least East New Jersey, in 1682 passed a statute, which, incidentally, might have been copied from Pennsylvania's *Laws Agreed Upon in England* (1682), that "in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause, and if unable, by their friends or attorneys."²² In other words, any party, if it elected to do so, could be represented by an attorney. This liberal policy — liberal for an early American colony — was limited, however, during the seventeenth and part of the eighteenth century by the scarcity of trained and experienced lawyers in the colony. In consequence, as it happened in other colonies, spellbinders, sharpers, and pettifoggers, and especially minor court officials offered their services as attorneys. This situation, in turn, compelled the legislature to follow the pattern established in other colonies and pass statutes (in 1676 and, again, in 1694) barring justices of the peace, sheriffs, deputies, clerks, and even messengers of attorneys from engaging in the practice of law. Since these statutes apparently were not altogether effective, a further act was passed in 1698 for East New Jersey, "that no Attorney or other Person be suffered to Practice or plead for Fee or Hire, in any Court of Judicature, in any Suit or Cause or Process in Law whatsoever, but such as are admitted to Practice by License of the Governor of the Province for the Time being."²³ Thus it appears that as early as 1698 the principle of central control over admission to practice was introduced in New Jersey. This principle was observed throughout the colonial history of the Province.

²² 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL 107 (1908).

²³ THE GRANTS, CONCESSIONS AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY 223; BENTON, THE LAWYER'S OFFICIAL OATH AND OFFICE 74 (1909).

In 1740, after New Jersey had been consolidated into one single Royal Province and a systematic judicature had been introduced, the legislature passed a comprehensive act regulating in detail the practice of law, including legal fees.²⁴ Fifteen years later, in 1755, in imitation of an English tradition, the ancient order of serjeants was recognized in New Jersey; and appointments to this exalted degree, which lasted until 1839, were made by rule of the Supreme Court.²⁵ The provision of 1755 was amended in 1763, when it was provided that "no person for the future shall practice as a serjeant in this court [the Supreme Court], but those that are recommended by the Judges [of the Supreme Court] to the Governor for the time being and duly called up by writ and sworn agreeably to the practice of England."²⁶ Subsequently the number of serjeants, who were also charged with conducting examinations for admission to practice, was limited to twelve. In 1767 a further provision, following the pattern established by English practices, made a distinction between attorneys and counsellors. No person was to be a counsellor unless he had been an attorney for at least three years, and unless he had been duly examined in court as to his qualifications and proficiency in the law.

In 1769-70, during a serious economic crisis which caused many business failures and, in consequence, much litigation, the bar of New Jersey came under strong attack by both the general public and the Legislature. The lawyers were accused of many abuses, including the demanding of exorbitant fees, unnecessary protraction of proceedings, and willful multiplicity of law suits. It was even whispered that the lawyers had brought on this crisis for their own benefit. In the Assembly charges of all sorts were brought against the leading practitioners, and crude acts of violence were committed against them in public places. But with the passing of the crisis these unwarranted outbursts subsided.

The three most prominent lawyers in colonial New Jersey were David Ogden (Yale 1723, serjeant in 1764, and associate justice of the Supreme Court in 1772), who in 1751 was considered "at the head of the Bar of his native State"; Richard Stockton (Princeton 1748, admitted to the bar in 1754, counsellor in 1758, serjeant in 1763, and associate justice of the

²⁴ 1 WARREN, *op. cit. supra* note 22, at 107.

²⁵ WARREN, *A HISTORY OF THE AMERICAN BAR* 113 (1913).

²⁶ *Ibid.*

Supreme Court in 1774), who was a pupil of David Ogden; and Joseph Reed (Princeton 1757), who also studied at the Middle Temple and became president of the second Provincial Congress in 1775. Richard Stockton acquired such a reputation as a lawyer that young men from New Jersey as well as from other colonies flocked to his office in order to study law or clerk under him. Among his pupils were Joseph Reed, Elias Boudinot, and William Paterson. Also, at least during the latter part of the eighteenth century, some of the more renowned lawyers of neighboring New York occasionally practiced in New Jersey.

That the New Jersey bar had become somewhat organized as a profession just prior to the outbreak of the Revolution might be inferred from the fact that in 1765 the lawyers called a statewide meeting to discuss the Stamp Act.²⁷ It was resolved unanimously that no stamps were to be used. Unfortunately, with this single exception, we possess no indication of any other joint meeting of the New Jersey bar, or whether the bar collectively ever discussed and decided on matters affecting the profession as a whole.

VIII. PENNSYLVANIA

The hostility of the early Pennsylvania colonists to the common law of England was both strong and enduring. William Penn and his Quaker followers had some rather unpleasant experiences with English law, English courts, and English lawyers, including the law officers of the Crown. Hence they had good reason to distrust and dislike them. Like the New England divines, the Quakers, though for an entirely different reason, had what might be called an instinctive antipathy for the traditional English common law and especially for the professional English lawyer whom they considered a man of strife. This prolonged and apparently deeply rooted aversion, strengthened by a zealous religious belief which rejected all forms of strife and controversy, seriously retarded the development of a systematic body of laws and the emergence of a legal profession in Pennsylvania.

But despite their aversion to the laws of England, the Quakers, being orderly people, also realized that they needed laws in order to govern themselves properly. William Penn saw to it that from the very beginning the colony had a body of written laws, composed in so plain a language that they could be under-

²⁷ POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 168 (1953).

stood by everyone, and, as well, that every person could plead his own cause.²⁸ This body of early Pennsylvania laws consisted of the *Laws Agreed Upon in England* of 1682, the *Act of Settlement* enacted in Philadelphia in 1683, eight chapters of statutes passed in 1683, the Frame of Government enacted in 1683 and 1696, and the statutes of 1701. On the other hand, the colonists felt absolutely free to adopt or reject whatever part of the English common law they saw fit. As a matter of fact, they were so arbitrary in their eclecticism that the first Royal Governor, Benjamin Fletcher, was compelled to inform the Assembly that some of their laws were repugnant to the law of England and, hence, invalid.

The first courts in Pennsylvania were the county courts which had both legislative and judicial functions. They were established in 1673 under the government of the Duke of York; and, since the Quakers refused to participate in legal controversies, for many years these courts were staffed with Swedes who apparently had no legal training whatsoever. No lawyer or attorney was permitted to appear before them. In 1682-83 the higher judicial functions were exercised by the Royal Governor and Council; and in 1684, under the new charter granted to William Penn, the Provincial Court (Supreme Court), composed of five judges, was set up. The first Chief Justice, Nicholas More, was a physician by training, and down to the year 1743, with very few exceptions, the most important judicial positions in Pennsylvania were held by laymen. Only John Guest (1706), Roger Mompesson (1706), and David Lloyd (1717-31), the latter according to James Logan a man "of sound judgment and a good lawyer," had been trained in the law.

In keeping with their peaceful disposition, the Quakers also introduced a system of arbitration courts to settle all disputes between citizens. These arbitration courts, which were manned by three laymen or "common peacemakers," were established in 1683 for every precinct; and the awards made by these "common peacemakers" were valid and final.²⁹ In 1705 it was further provided that litigants might refer their disputes to per-

²⁸ In 1687, William Penn published an edition of Magna Charta which contains gleanings from Coke. James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, HARVARD LEGAL ESSAYS 159-61 (1934).

²⁹ LAWS OF PENNSYLVANIA, 1682-1700. c. 65, CHARTER AND LAWS OF THE PROVINCE OF PENNSYLVANIA 128 (George, Nead and McCamant 1879); 2 STATUTES AT LARGE OF PENNSYLVANIA, c. 150 (1705-06) p. 242. We are also told that at that time a very great share of the administration of justice in Pennsylvania was entrusted to common peacemakers. 1 Dall. (Pa.), Preface (2d ed. 1806).

sons mutually chosen in open court, whose award had the effect of a final verdict. Hence it is not surprising to read that in a litigation (in 1684) the "Governor and the Council advised . . . [the litigants] to shake hands and forgive One another: and ordered . . . that the Records of the Court Concerning that Business should be burnt."³⁰ The practice of referring litigation to "peacemakers" was gradually extended to every type of litigation, so that in the end a very large share of the administration of justice became entrusted to lay referees. This policy or system was simply a manifestation of the general early colonial tendency, especially noticeable in Pennsylvania, to get along without lawyers either on the bench or at the bar. The Quaker colonists apparently were perfectly content with lay judges and lay "peacemakers." But this is just another instance of the utopian attempt, so frequently found among colonial peoples or "exiles," to administer justice without law and, consequently, without lawyers. This attitude, which amounted to a veritable policy, is well expressed by Gabriel Thomas in 1698:

Of Lawyers and Physicians I shall say nothing, because this Country [Pennsylvania] is very Peaceable and Healty; long may it so continue and never have the occasion for the Tongue of the one, nor the Pen of the other, both equally destructive of Men's Estates and Lives.³¹

In compliance with a policy of administering justice without lawyers, the *Laws Agreed Upon in England* (of 1682) provided that:

in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves; or, if unable, by their friend: . . . [and t]hat all pleadings, processes and records in courts, shall be short, and in *English*, and in an ordinary and plain character, that they may be understood, and justice speedily administered.³²

Hence it is not surprising that during the first twenty-five years of the colony there could be found in Pennsylvania, only about three or four trained lawyers — all of them educated in England — and twenty-three "attorneys,"³³ all of whom were laymen

³⁰ 1 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 106 (1852). The case referred to is *Johnson v. Hance*.

³¹ THOMAS, A HISTORICAL AND GEOGRAPHICAL ACCOUNT OF THE PROVINCE AND COUNTRY OF PENNSYLVANIA AND WEST JERSEY 32 (1698).

³² LAWS AGREED UPON IN ENGLAND, art. 6 & 7, CHARTER AND LAWS OF THE PROVINCE OF PENNSYLVANIA 100 (George, Nead and McCamant 1879); LAWS OF PENNSYLVANIA, 1682-1700, c. 66; CHARTER AND LAWS OF THE PROVINCE OF PENNSYLVANIA 128 (George, Nead and McCamant 1879).

³³ MARTIN, BENCH AND BAR OF PENNSYLVANIA 236 (1883).

without any legal training whatsoever. In 1686 and again in 1690, the Provincial Council passed an act forbidding any person to plead the cause of another unless he had "solemnly attested in open Court, that he neither directly nor indirectly hath in any wise taken or received, or will take or receive to his use or benefit, any reward whatsoever for his soe pleading."³⁴ But despite all these attempts to suppress attorneys as a professional class, a small group of lawyers already existed around the year 1700. Events and the exigencies of life proved to be stronger than all pious but unrealistic intentions: experienced lawyers simply had become a necessity for the proper administration of justice according to a stable law. But even then progress was slow. In 1706 the whole of the trained legal profession in Philadelphia consisted of G. Lowther, David Lloyd (probably the outstanding Pennsylvania lawyer of his time and probably the greatest single influence on the character of early Pennsylvania legislation), Robert Ashedon (or Assheton), Thomas Clark, Peter Evans, and John Moore. It is not surprising, therefore, that in 1708 and again in 1709 complaints and petitions should be made that all available competent lawyers had been retained by the petitioner's adversary so as "to deprive . . . your Petitioner . . . of all advice in Law."³⁵ The petitioner, in one instance, prays to have counsel assigned to him by the Council, or, as in the case of 1709, to be permitted to "fetch lawyers from New York or remote places."³⁶

The aversion to the professional and professionally trained lawyer, as might be expected, gave rise in Pennsylvania, as elsewhere, to a class of irresponsible and reckless people who began to offer their services as attorneys. For, to reiterate, whenever and wherever the legal profession is suppressed as a class, no matter for what reason, the work that ought to be done by responsible and trained experts, of necessity falls into the hand of irresponsible and ignorant charlatans. A contemporary observer aptly describes the situation in Pennsylvania: with a few exceptions the lawyers of that period "are persons of no knowledge and . . . no principle."³⁷ Matters certainly were not improved upon by the fact that court officials and "peacemakers" fre-

³⁴ Lloyd, *The Courts of Pennsylvania in the Eighteenth Century Prior to the Revolution*, 56 U. PA. L. REV. 28, 46 (1908).

³⁵ *Id.* at 48. Cf. 2 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 430 (1852).

³⁶ Lloyd, *Supra* note 34, at 47.

³⁷ 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL 102 (1908).

quently acted as attorneys for the parties. Neither could much progress be expected from the *Act for Establishing Courts of Judicature* (of 1710) which also provided for the admission of attorneys by individual courts.³⁸

In 1722, Pennsylvania established a real system of courts to administer justice according to law. This act, among other matters, also provided:

That there may be a competent number of persons, of an honest disposition, and learned in the law, admitted by the Justices of the . . . respective courts, to practice as Attorneys here; who shall behave themselves justly and faithfully in their practice Attornies so admitted may practise in all the courts of this province without, any further or other license or admittance³⁹

Thus it appears that in Pennsylvania each individual court admitted attorneys to practice before it, and that admission by one court authorized the person so admitted to practice before all other courts. Whether this authorization was based on a principle of comity or merely on custom cannot be determined. In 1726, in order to restrain the pettifoggers, an attorney's oath of office, which still continued the Quaker form of "thou" and "thy," was prescribed by the Governor:

Thou shalt behave thy self in the Office of Attorney within the Court, according to the best of thy Learning and Ability, and with all good Fidelity, as well as to the Court as to the Client: Thou shalt use no Falshood, nor Delay any Persons Cause for Lucre or Malice.⁴⁰

It may be observed here that wherever each individual court severally admits practitioners to its own bar, these practitioners soon begin to consider themselves members of a distinct bar and, in consequence, gradually develop a strong sense of professional solidarity with the result that they take an active interest in the affairs of the bar as a whole, especially in such matters as training, qualifications, and admission to practice. This was the case in Massachusetts, Maryland, Pennsylvania, and New Hampshire. Hence it is not surprising that soon after the passing of the Judicature Act of 1722, and even before that time, a small bar emerged in Pennsylvania and, particularly, in Philadelphia. But due to the lingering effects of the Quakers' hostility towards the "litigious lawyers," the Pennsylvania bar developed only slowly. Horace Binney, the leader of the Philadelphia bar during

³⁸ Lloyd, *supra* note 34, at 46.

³⁹ 1 LAWS OF PENNSYLVANIA 185 (1797).

⁴⁰ *Id.* at 327 (1728).

the early nineteenth century, was fully justified when he stated: "Of the primitive Bar of the Province [Pennsylvania] we know nothing; and next to nothing of the men who appeared at it from time to time, up to the termination of the Colonial government."⁴¹ And Chief Justice Tilghman adds:

From what I have been able to learn, of the early history of *Pennsylvania*, it was a long time before she possessed lawyers of eminence. There were never wanting, men of strong minds, very well able to conduct the business of the courts without much regard to form. Such, in particular was *Andrew Hamilton*⁴²

Early in the eighteenth century, as has been pointed out, the Philadelphia bar, the most important bar in Pennsylvania, consisted of four trained lawyers: G. Lowther, David Lloyd, Thomas Clark, and Robert Ashedon. Ashedon came from England, while David Lloyd was a Welshman who had been sent from England as Attorney-General in 1686 and became Chief Justice in 1717. Some English trained lawyers soon joined this small group, among them John Moland and Andrew Hamilton. Hamilton may be considered the best known lawyer in colonial America. Born in Scotland in 1676 (?), he settled first in Virginia, then in Maryland, and finally in Philadelphia. In 1712 he returned to England and was called to the bar of Gray's Inn in 1713. His title to fame is chiefly based on his brilliant and successful defense of Peter Zenger (and the right of free speech and free press) against the charge of criminal libel in 1735. This trial was held in New York, and Hamilton had been specially retained to come to New York despite his fairly advanced age. His address to the jury in the Zenger case has been characterized as the "greatest oratorical triumph won in the colonies prior to the speech of James Otis against writs of assistance."⁴³ Among his contemporaries, the *Colonial Records* of 1736 report, Hamilton "was esteemed and allowed to be as able in that profession [the legal profession] as any on the Continent of America."

After 1740 the Pennsylvania bar began to rise to real eminence, and during the last decades before the Revolution it attained such unrivalled excellence and so high a standing in the colonies that the designation of "Philadelphia lawyer" became a current byword for a lawyer of exceptional prominence and

⁴¹ BINNEY, *LEADERS OF THE OLD BAR OF PHILADELPHIA* iii (1866).

⁴² *Lyle v. Richards*, 9 S. & R. 322, 332 (Pa. 1823).

⁴³ 2 OSGOOD, *THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY* 460 (1924).

ability. Many of these outstanding practitioners had been trained in the Inns of Court where, aside from sound legal learning, they had also acquired a vast intellectual culture. It is perhaps significant that during the period between 1742 and 1776 no less than seventy-six lawyers were admitted to practice in the Supreme Court of Pennsylvania, while around the year 1700 there were but four trained lawyers in the whole colony. During the time of Andrew Hamilton perhaps the most accomplished lawyer was Tench Francis, the undisputed leader of the Pennsylvania bar, who, in the opinion of Chief Justice Tilghman "appears to have been the first of our lawyers, who mastered the technical difficulties of the profession,"⁴⁴ something that could not always be said about Hamilton. Somewhat later came Benjamin Chew, who had read law under Andrew Hamilton and was a barrister of the Middle Temple (Chief Justice in 1774), characterized by William Rawle, himself a prominent lawyer, as a man of "solid judgment . . . [and] persevering industry," with perhaps no superior in accurate knowledge of the common law or in sound exposition of the statutes; Thomas McKean, a barrister of the Middle Temple, who became the uncompromising foe of the Stamp Act (Chief Justice in 1777); Edward Shippen, who studied under Tench Francis and later became a barrister of the Middle Temple (Chief Justice in 1799); John Dickinson, the "Hamlet of the American Revolution," who studied under John Moland and later became a barrister of the Middle Temple; George Read, who studied under John Moland and later became one of the signers of the Declaration of Independence (Chief Justice of Delaware in 1793); Francis Hopkinson (College of Philadelphia 1757), also a signer of the Declaration of Independence, who had studied law under Benjamin Chew; and James Wilson, a Scotchman by birth (he attended the University of St. Andrews and probably the University of Glasgow), who came to Pennsylvania in 1765, entered the law office of John Dickinson and was admitted to practice in 1767. In due time Wilson became one of the leading lawyers in the Quaker City, where he was to hold a law professorship at the College of Philadelphia. In 1774 he advanced the theory that Parliament had no power over the colonies.⁴⁵ A signer of the Declaration of Independence, he became one of the truly constructive minds in the Constitutional Convention of 1787, "one of the deepest

⁴⁴ Lyle v. Richards, 9 S. & R. 322, 332 (Pa. 1823).

⁴⁵ ADAMS, SELECTED POLITICAL ESSAYS OF JAMES WILSON 45 (1930).

thinkers and most exact reasoners.”⁴⁶ In 1789 he was appointed Associate Justice of the Supreme Court of the United States.

Few colonies during the latter half of the eighteenth century could boast of as many distinguished lawyers who had received their legal training at the English Inns of Court.

IX. DELAWARE

Delaware or the three “lower counties” (New Castle, Kent, and Sussex), after its seizure from Holland (in 1664 and, again in 1674), in 1680 was leased to William Penn “for 10,000 years” by the Duke of York, and conveyed to Penn by a deed of feoffment in 1682. It became united with the Province of Pennsylvania in 1693. In 1704 it established a separate legislature, in 1710 a separate executive council, and in 1721 its own system of courts, although the Governor of Pennsylvania remained its chief executive until 1776 when Delaware set up its own state government.

In matters of law as well as in its system of courts Delaware was largely under the influence of Pennsylvania; and, like in Pennsylvania, each Delaware court individually admitted its own attorneys, although admission to practice in any county court was tantamount to admission in all county courts. Following the contemporary English distinction between barrister and solicitor, Delaware distinguished between general practitioners at common law and practitioners in equity. This distinction becomes evident from *An Act about Attornies and Solicitors*, passed in 1704.⁴⁷ In order to prevent “abuses and irregularities in all and every court,” and in order “that all Attornies and Solicitors practising therein may be duly qualified to execute and perform the trust in them reposed,” the Act of 1704 provided that

before any Attorney, Solicitor, or other person whatsoever, shall be admitted to plead for any reward or fee in any of the courts . . . such Attorney, Solicitor, or other person . . . shall take the oaths, and repeat and subscribe the declaration prescribed by act of Parliament in England [*An Act for the Security of Her Majesty's Person and Government, and of the Succession to the Crown in the Protestant line*]; and shall take the oath thereafter mentioned, viz. You shall do no falsehood or deceit, nor consent to any to be done, in this court, to your knowledge; and if you know of any to be done, you shall give knowledge thereof . . .

⁴⁶ 1 BRYCE, *THE AMERICAN COMMONWEALTH* 250, 665 (1888).

⁴⁷ 1 LAWS OF THE STATE OF DELAWARE c. 13, § 1 (1797 ed.). cf. BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 44 (1909).

that it may be reformed: You shall delay no man for lucre or malice, having reasonable fees first allowed you for the same: You shall plead no foreign plea, nor sue any foreign suits, unlawfully, to the hurt of any man, but such as shall . . . stand with the order of the law and your own conscience: You shall not wittingly and willingly sue, or procure to be sued, any false suits, nor give aid or consent to the same, on pain of being expelled from this court for ever . . . You shall truly use and demean yourself in the office of an attorney within this court, according to your learning and discretion.⁴⁸

Of particular interest here is the passage that the attorney always ought to act in compliance with the law as well as the dictates of his own conscience.

In 1721 the provisions of the Act of 1704 were changed by *An Act for Establishing the Courts of Law and Equity Within This Government*, which indicates that Delaware, too, was plagued by pettifoggers and spellbinders:

[T]hat there may be a competent number of persons of an honest disposition, and learned in the law, admitted . . . to practice as Attornies there, who shall behave themselves justly and faithfully in their practice, and before they are . . . admitted, shall take the following qualification, Thou shalt behave thyself in the Office of Attorney . . . according to the best of thy learning and ability, and with all good fidelity as well to the court as to the client: Thou shalt use no falsehood, nor delay any person's cause through lucre or malice.⁴⁹

It was further provided that if attorneys

misbehave . . . they shall suffer such penalties and suspensions as Attornies at Law in Great Britain are liable in such cases [N]o person, not being an inhabitant of this government, or of the province of Pennsylvania, shall be permitted to plead in any court or courts within this government, without license first obtained from the Governor . . . by the recommendation of the Justices of one of the County Courts . . . unless such lawyer . . . shall obtain the court's leave, and pay . . . the sum of fifty Shillings⁵⁰

Hence it appears that "out-of-state lawyers" had to be licensed by the Governor or, in lieu of such a license, pay fifty shillings for the permission to plead; native lawyers, on the other hand, were admitted by each individual court, and this admission entitled them to practice before all courts.

Overshadowed by the outstanding Pennsylvania bar and held back by its smallness, relative poverty, and close political ties with Pennsylvania until the Revolution, Delaware never devel-

⁴⁸ *Ibid.*

⁴⁹ 1 LAWS OF THE STATE OF DELAWARE c. 54, §§ 26, 27 & 28 (1797 ed.).

⁵⁰ *Ibid.*

oped a truly distinguished bar of its own. Shortly before the Revolution, however, in order to improve the caliber of its lawyers, it required, that any person wishing to be admitted to practice had to have three years of study. Some of the great "Philadelphia lawyers" of the latter eighteenth century, such as Thomas McKean, also practiced in Delaware.

X. MARYLAND

Maryland, which was founded in 1634, claimed to be governed by the common law of England. In this it was opposed by the Proprietor who insisted that under the charter he had an absolute right to govern and, hence, was not bound by the common law. Finally, in 1646, by the Act for Rule of Judicature, the following compromise was reached:

Right and just in all civil causes shall be determined [by the judge] according to the law or most General usage of the Province And in defect of such Law usage or president, then right and just shall be determined according to equity and good conscience, not neglecting . . . the rules by which right and just useth and ought to be determined in England in the same or the like cases. And all crimes and offenses shall be judged and determined according to the law of the Province, or in defect of certain Law, then they may be determined according to the best discretion of the Judge or Judges judging, as neer as conveniently may be to the laudable law or usage of England in the same or like offenses.⁵¹

The provision of 1646 was implemented by an act of 1662 which declared that when the laws of the province were silent, justice was to be administered according to the laws and statutes of England, and that the courts must take cognizance of the inconsistency of the English laws with "the good of the Province, according to the best of their judgment."⁵² In 1732 it was further provided that wherever "the acts and usages of the Province are silent, the rule of judicature is to be according to the law and statutes and reasonable customs of England, as used and practised within the Province."⁵³ This latter passage indicates that Maryland, as late as 1732, reserved the right to accept or reject any part of the English common law it saw fit, that is, any part which it considered to be in accord, or not in accord, with the customs and traditions of the Province. Hence the common law

⁵¹ 1 MARYLAND ARCHIVES, PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY 147. See also Steiner, *The Adoption of English Law in Maryland*, 8 YALE L. J. 353 (1899).

⁵² Anonymous, *Maryland Jurisprudence*, 15 AMERICAN JURIST 251, 261 (1836).

of England was not regarded as being ipso facto binding upon the colonists.

From its foundation, Maryland had a rather elaborate system of courts, very much patterned after the English judicature of the time. After 1638, the Provincial Court began to assume all superior jurisdiction which formerly had been vested in the General Assembly. This Provincial Court consisted of the Governor, who acted as the Chief Justice, and the Council, all appointed by the Proprietor or his deputy. In 1692, when Maryland ceased to be a Proprietary Province and became a Royal Province, a new Provincial Court was created apart from the Governor and Council, although the Governor and Council remained the Court of Appeals. With the appointment of independent judges who were not members of the Governor's Council or the Governor himself, Maryland finally established an independent judicature distinct from the legislature and the executive. Unfortunately, and to the great distress of the bar, the vast majority of these independent judges were not trained in the law. As late as 1767 complaints were heard that "the Judges were [not] lawyers by profession."⁵⁴

The relatively early recognition of the common law, at least of the "subsidiary function" of the common law, as well as the fact that the judicature was fairly well organized, contributed much to the early emergence and development of a trained bar in Maryland. Also, unlike in other colonies, there seems to have been little aversion to the lawyer from the beginning. The first lawyer on record, and probably the "father of the Maryland bar," was John Lewger, the attorney of the Proprietor, who practiced law as early as 1637. He was soon joined by James Cauther who arrived in the same year; Cyprian Thoroughgood who began practicing in 1638; Cuthbert Fenwick who appeared in 1640; and many other practitioners such as Thomas Gerrard, Peter Draper, Thomas Notley, Thomas Mathews, William Harditch, George Manners, John Weyville and Giles Brent. About this time the first American woman lawyer also made her appearance, a Mrs. Margaret Brent, who "was to be looked upon and received as . . . [an] attorney."⁵⁵

⁵³ *Id.* at 262.

⁵⁴ *West v. Stigar*, 1 Harris and McHenry 247, 248 (Md. 1767). The quotation is taken from Daniel Dulany's "observations . . . on this case." Cf. 20 MARYLAND ARCHIVES 379.

⁵⁵ 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL 75 (1908). This statement appears in the RECORD OF THE GENERAL ASSEMBLY OF MARYLAND, Jan. 21, 1647-48.

By the year 1659 the attorney apparently was fully recognized as a professional man. This becomes evident from a statute of the same year which provided that "the attorneys on both sides speak distinctly to one error first before they proceed to the next, without disturbing each other."⁵⁶ Ten years later, in 1669, the attorneys were sufficiently prominent and numerous to warrant a report by the Committee of the Lower House of the General Assembly to the effect that "the privileged attorneys are one of the great grievances of the country."⁵⁷ The House preferred impeachment proceedings against one John Morecraft, an attorney, on specification that he had taken fees from both parties, and that he had demanded and accepted "unreasonable fees for a whole year's space." The Upper House, however, acquitted Morecraft of these charges and expressed its astonishment that "attorneys of ability and sworn to be diligent and faithful" should be regarded "a grievance, nay, the grand grievance of the country."⁵⁸ From this latter passage it may be inferred that prior to 1669 attorneys, upon admission to practice, had to take an oath that they would practice diligently and faithfully.

Despite its favorable attitude towards the professional lawyer, Maryland, too, was plagued with sharpers, pettifoggers, and spellbinders. In 1671 an act was passed forbidding sheriffs, commissioners, clerks, deputy sheriffs, and other inferior court officers from practicing as attorneys in the courts to which they were attached.⁵⁹ In 1674, as a result of the excessive number of attorneys and certain abuses perpetrated by some attorneys, especially the charging of exorbitant fees, a statute was enacted that thereafter only "a certain number of honest and able attorneys [and counsellors] be admitted, nominated, and sworn" by the Governor, and all others to be forbidden to practice law.⁶⁰ Attorneys practicing in the county courts were to be appointed by the commissioners or judges of the county courts. The Act of 1674 also regulated fees; and heavy fines, suspension, and disbarment were imposed on attorneys demanding or accepting fees in excess of the statutory maximum. Thus it seems that admission to practice in the Provincial Court, at least for the

⁵⁶ WARREN, *A HISTORY OF THE AMERICAN BAR* 52 (1913).

⁵⁷ *Ibid.*

⁵⁸ Riley, *The Development of the Legal Profession in Maryland*, 4 *TRANSACTIONS, MARYLAND STATE BAR ASSOCIATION* 87 (1899).

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* Cf. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 150 (1953).

time being, was under the control of the Governor, while admission in the lower courts was within the discretion of these courts. In 1692, on the convening of the Provincial Court after the Protestant Revolution, George Plates, Griffith Jones, William Dent, Samuel Watkins, and Philip Clark had to take the new oath which demanded allegiance to her Majesty's person and government and the succession to the Crown in the Protestant line. It appears, therefore, that these men constituted the regular Maryland bar towards the end of the seventeenth century, or, at least, the bar admitted to practice before the Provincial Court. On motion, the court also limited the number of attorneys to be admitted to practice before it.

In 1714 an act was passed regulating the fees and conduct of attorneys:

[A]ll Attornies practising in the several County Courts . . . shall have for their Fee in any Cause, where the real Debt sued for, or the Balance recovered, exceeds the Sum of Ten Pounds *Sterling*, or Two thousand Pounds of Tobacco, the Sum of Two hundred Pounds of Tobacco; and that any Attorney practising in the said Courts, that shall refuse to prosecute or defend the Cause of any Person or Persons making Application to him (unless before retained) having the said Fee paid, or secured to be paid him, or that shall ask, receive, or demand in any such Action, by any Colour or Pretext whatsoever, more than the said Fee, shall forfeit and pay the Sum of Five hundred Pounds of Tobacco . . . and upon Conviction thereof to be suspended [from] his Practice in the said Court, for and during One whole Year.⁶¹

It will be noted that this provision was drawn up in imitation of similar provisions enacted in neighboring Virginia during the seventeenth century.

In 1715 a further act was passed providing that no one should practice law without being properly admitted:

[F]rom and after the end of this present session of the assembly, no attorney, or other person whatsoever, shall practise law in any of the courts of this province, without being admitted thereto by the justices of the several courts, who are hereby empowered to admit and suspend them . . . until his majesty's pleasure shall be known therein; but any attorney, or any other person practising the law in this province, or the Plaintiff that shall sue in any county court where he does not reside, shall be obliged to give security for the payment of all the officers fees that shall accrue upon any suit by him to be commenced, either at the time of the issuing of the writ in the action, or

⁶¹ ACTS OF ASSEMBLY, PASSED BY THE PROVINCE OF MARYLAND, FROM 1692 TO 1715 83. Cf. RILEY, *op. cit. supra* note 58, at 93; BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 52 (1909).

during the continuence of the court to which such writ shall be returned, on pain of payment such fees himself, or suffering his client to be nonsuited, in default of such security to be given, or of such attorney signifying his intention to pay such fees . . . [N]othing in this act shall . . . give right to any courts in this province to admit any attorney, or other person practising the law, to practise in any court that has been already refused so to do by his excellency, and his majesty's honourable councill, nor to any person that shall not qualify himself by taking the oaths appointed to be taken . . .⁶²

About this time court rules also required both judges and lawyers to wear gowns in court. In 1721 and, again, in 1722 further provisions were made for the punishment of lawyers who through willfulness or neglect of duty had inflicted losses on their clients.

In 1725, a legislature apparently hostile to the emerging class of legal practitioners while, at the same time, favoring the planters and merchants, passed a statute which not only regulated the lawyer's fees with unwonted strictness, but also gave the planters and merchants an option to pay these fees either in tobacco, as it had been done in Virginia, or in currency at a rate fixed by law.⁶³ Daniel Dulany, heading a committee which included Michael Howard, Thomas Bordley and Joshua George, petitioned against this act in the Upper House, alleging that it infringed upon their rights and privileges as Englishmen. Thus it seems that the bar of Maryland in this instance acted as a body. Despite their protests, the act was extended for ten years in 1729. Once more the Maryland bar objected in unison to these measures. It petitioned to the Proprietor in London, retaining as its London counsel John Sharpe, a barrister from Lincoln's Inn. On the opinion of the Attorney-General, Sir Philip Yorke, later Lord Chancellor Hardwicke, the act was disallowed by the Proprietor, since it "was not agreeable to any law known here."⁶⁴ The action of Dulany and the subsequent protest by the lawyers of Maryland may be considered steps taken by an organized local bar. In any event, there exists a record dating back to the year 1679, according to which the Proprietor deeded an acre of land in the City of St. Mary's to three "attorneys of our Provincial Court . . . on their petition for them to build and erect chambers for the more commodiuous dispatch of their clients'

⁶² 1 LAWS OF MARYLAND c. 48, §§ 12, 13 (1811 ed.).

⁶³ WARREN, A HISTORY OF THE AMERICAN BAR 53 (1913).

⁶⁴ *Id.* at 54.

business and affairs.”⁶⁵ There can be little doubt that this petition was a kind of joint undertaking by the bar of the Provincial Court of Maryland. Thus it is quite possible that the Maryland bar was the first organized bar in America which resorted to collective action in order to promote and protect professional interests.

By the year 1765 the social and economic conditions of Maryland had made possible the flourishing of a truly eminent bar which included a great many professional and trained lawyers of outstanding ability. The land laws, which had grown extremely complicated and technical, and the rapid expansion of commerce had given rise to much litigation. Also, the incipient political struggles with the English Crown, especially the struggle over the Stamp Act, as well as the warding off of the constant and arbitrary incroachments by the Royal Governor, made heavy demands upon the talents and abilities of the Maryland lawyers who, indeed, were exceptionally well qualified to cope with this situation.

Among the most outstanding lawyers in Maryland during the early eighteenth century were Charles Carroll, the Elder (admitted to practice in 1709); Thomas Bordley; Stephan Bordley; Robert Ridgely; Henry Jowles, an English barrister; and Griffith Jones. Daniel Dulany, the Elder, who was the leader of the profession during his time, had been educated at the University of Dublin and was called to the bar of Gray's Inn in 1716. Charles Carroll of Carrollton had been educated at the University of Douai in France and in the Inner Temple.

During the second half of the eighteenth century the most outstanding lawyers in Maryland were Daniel Dulany, the Younger (son of Daniel Dulany, the Elder), who by some people has been regarded as perhaps the greatest pre-Revolutionary lawyer in America; Thomas Johnson, Associate Justice of the Supreme Court of the United States in 1791, who studied law under Stephen Bordley and, in 1775, placed George Washington in nomination for the supreme command; Charles Carroll, the Younger, who studied in France and at the Middle Temple, one of the signers of the Declaration of Independence; Samuel Chase, Chief Justice of Maryland in 1791 and Associate Justice of the Supreme Court of the United States in 1796, one of the driving forces behind the American Revolution in Maryland and a signer of the Declaration of Independence; William Paca (Col-

⁶⁵ RILEY, *op. cit.* *supra* note 58, at 87, 93.

lege of Philadelphia 1759), who studied law under Stephen Bordley, was called to the bar of the Middle Temple, admitted to practice in Maryland in 1764, Chief Justice of Maryland in 1778 and one of the signers of the Declaration of Independence; Thomas Stone, one of the signers of the Declaration, who studied law under Stephan Bordley and was admitted to practice in 1764; John Hammond; Charles Gordon; and George Chalmers, a Scotch lawyer who came to Baltimore in 1763 and returned to England in 1775.

Daniel Dulany, the Younger, was educated at Eaton, Cambridge, and the Middle Temple. In his professional life he enjoyed such a reputation that he was consulted on questions of law by eminent English barristers. Cases were frequently withdrawn from Maryland courts, and once even from the Lord High Chancellor of England, to be submitted to him for his opinion and decision. Some of his legal opinions were subsequently included in the official Maryland reports upon their first publication in 1809. It was said about him that his opinions "had almost as much weight in court in Maryland, and hardly less with the court lawyers of England, than the opinions of the great Roman jurists that were made authority by the edict of the Emperor, had in Roman court."⁶⁶ His arguments against the Stamp Act on the basis that without representation there could be no taxation were so forceful and persuasive that William Pitt drew heavily upon them when arguing for repeal of the Act.^{67†}

⁶⁶ TYLER, MEMOIRS OF ROGER BROOKE TANEY 18 (1872).

⁶⁷ These arguments appear in DULANY, CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES, FOR THE PURPOSE OF RAISING A REVENUE, BY THE ACT OF PARLIAMENT (1765). This pamphlet took issue with the Stamp Act.

† Part two of a three-part series. The third part will appear in Vol. XXXIV, No. 1 (December Issue) of the NOTRE DAME LAWYER.